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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91191705
Party	Defendant Biggs, Joseph W.
Correspondence Address	DAVID L. SIGALOW ALLEN, DYER, DOPPELT, MILBRATH & GILCHRI 255 S ORANGE AVE STE 1401 ORLANDO, FL 32801-3460 dsigalow@addmg.com
Submission	Motion to Dismiss - Rule 12(b)
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Date	10/07/2009
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Trademark Application of:
W. Joseph Biggs

Application No.: 77/572,901

Filed: September 18, 2008

Mark: **PANAMA CITY BIKE WEEK**

JOE COOL, INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91191705
)	
W. JOSEPH BIGGS,)	
)	
Applicant.)	

**MOTION TO DISMISS OPPOSER'S NOTICE OF OPPOSITION, OR,
ALTERNATIVELY, TO STRIKE PORTIONS OF PARAGRAPH 16 OF THE NOTICE**

W. JOSEPH BIGGS ("Applicant"), by and through his undersigned counsel, hereby moves that the Notice of Opposition ("Notice") filed by Opposer JOE COOL, INC. ("Opposer") be dismissed pursuant to the Federal Rules of Civil Procedure Rule 12(b)(5) for insufficient service of process and failure to comply with 37 C.F.R. §2.101 and §2.119 ("Rule §2.101" and "Rule §2.119," respectively), or, alternatively, for portions of paragraph 16 of the Notice to be stricken for raising matters outside the scope of the Board's jurisdiction, and in support thereof, states as follows:

I. The Notice of Opposition Should be Dismissed for Lack of Service.

Rule 2.101 requires Opposer to serve its Notice on Applicant's attorney of record. Rule §2.101(a) and (b) and 2.119. As Opposer has not affected service as required, on either Applicant's attorney of record or Applicant, this opposition is due to be dismissed as a result.

Exhibit A, Declarations of David L. Sigalow, Esq. and W. Joseph Biggs; *Springfield Inc. v. XD*, 86 USPQ2d 1063 (TTAB 2008) (motion to dismiss opposition granted when opposer notified Board of service of opposition via ESTTA filing but failed to serve a copy of the notice on applicant).

Although Opposer included a Certificate of Service in its Notice, this alone is not sufficient in absence of actual service, especially as Opposer also stated that “[t]his Notice of Opposition is being filed electronically, so no duplicate copy is in order.” (Dkt. No. 1, p. 5). Regardless, the Board in *Springfield* made clear that a Certificate of Service, absence actual service, does not allow an opposition to survive a motion to dismiss for improper service:

The proof of service requirement assumes actual service on applicant. *Proof of service is meaningless in the absence of actual service in accordance with the statements contained in the proof of service.* The requirement of the rules is for proof of service, not a promise to make service at some time in the future. In the instant case, as discussed above, the notice of opposition included proof of service, but there was no actual service on applicant. Thus, opposer did not comply with the service requirement of the rules. Accordingly, opposer’s notice of opposition should not have received a filing date, and this proceeding should not have been instituted.

Id. (emphasis added); *see also Schott AG v. L’Wren Scott*, 88 USPQ2d 1862 (TTAB 2008) (opposition dismissed when opposer failed to include a certificate of service with the notices of opposition, filed via first class mail, and did not dispute its failure to actually forward service copies to applicant).

Moreover, even the alleged Certificate of Service itself is inadequate, as it tellingly only goes so far as to say that “Joe Cool, Inc. verifies that it has *prepared* a copy of the foregoing to be served on Applicant by fax transmission [sic] / 1st class mail on 8 28 09 [sic],” not that such copy was actually served. (Dkt. No. 1, emphasis added). Opposer was already advised that such a Certificate is defective in co-pending Opposition No. 91190281, which involves the same Applicant and Opposer. Significantly, in that matter, the Interlocutory Attorney warned Opposer

that “[n]o consideration will be given to any paper subsequently filed by [O]pposer which lacks a proper certificate of service.” (Exhibit B, Opposition No. 91190281, Dkt. No. 14, p. 3). However, despite this warning, Opposer has still failed to follow the Rules of service. In view of same, the Notice of Opposition should be dismissed.

II. Alternatively, Portions of Paragraph 16 of the Notice Should be Stricken.

In the event that the Board does not grant Applicant’s Motion to Dismiss, Applicant respectfully requests that the Board issue an order striking those parts of paragraph 16 of the Notice for including extraneous wording, namely “unclean hands,” and matters outside the Board’s jurisdiction, namely, “violations of the Anti Trust Laws [sic].” This same relief was granted in the above-referenced co-pending Opposition No. 91190281 in response to Applicant’s Motion for More Definite Statement, but was apparently not taken into consideration by Opposer in this new filing. (Exhibit B, Opposition No. 91190281, Dkt. No. 14, p. 4).

WHEREFORE, it is respectfully requested that the Notice of Opposition be dismissed, or in the alternative, that the inappropriate portions of paragraph 16 of the Notice of Opposition be stricken.

Dated: October 20, 2009.

Respectfully submitted,

David L. Sigalow, Esq.
Allison R. Imber, Esq.
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& Gilchrist, P.A.
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Attorneys for Applicant

Certificate of Service

The undersigned hereby certifies that on this ___ day of October, 2009, a copy of the foregoing was served via first class mail, postage prepaid, on the following:

Joe Cool, Inc.
c/o Bakshet
719 Eastern Parkway St. 3
Brooklyn, NY 11213

and

Joe Cool, Inc.
1052 N. Beach St.
Holly Hill, FL 32117

A handwritten signature in blue ink, reading "Stephanie D. Simmons", is written over a horizontal line.

Stephanie Simmons

EXHIBIT A

I affirm under penalty of perjury that the foregoing statements are true and accurate.

Executed on this 14 day of October, 2009.



David L. Sigalow, Esq.

**THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**In re Trademark Application of:
W. Joseph Biggs**

Application No.: 77/572,901

Filed: September 18, 2008

Mark: PANAMA CITY BIKE WEEK

JOE COOL, INC.,

Opposer,

V.

W. JOSEPH BIGGS,

Applicant.

Opposition No. 91191705

DECLARATION OF W. JOSEPH BIGGS

I, W. Joseph Biggs, hereby declare and state as follows:

1. I am over 18 years of age and make this declaration based upon my own personal knowledge.

2. My address is that listed in the subject U.S. Trademark Application Serial No. 77/572,901, namely, Suite C, 11 Miracle Strip Loop, Panama City Beach, Florida 32417.

3. Neither myself nor anyone at the above-referenced address has received a copy of Opposer's Notice of Opposition as of the date of this Declaration.

I affirm under penalty of perjury that the foregoing statements are true and accurate.

Executed on this 6 day of October, 2009.

W. Joseph Biggs